Sanwell Corp v Trans Resources Corp Sdn Bhd & Anor

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02–10 OF 2001 (W)
STEVE SHIM CJ (SABAH & SARAWAK), ABDUL MALEK AHMAD AND MOHTAR ABDULLAH FCJJ
20 MAY 2002

Arbitration *— Stay of proceedings — Step taken in proceedings — Entry of appearance, whether amounted to steps taken in proceedings — Service of pleadings and other steps taken, whether amounted to unequivocal intention to proceed with suit and to abandon right to have dispute disposed off by arbitration — Arbitration Act 1952 s 6*

The dispute between the appellant and the first respondent centred upon an earthworks contract, which contained an arbitration clause. In the present appeal, the question posed to this court was whether the function to be served by an entry of appearance in one statute, ie the Rules of the High Court 1980 ('the RHC') was the same as the function to be served by the words 'steps in the proceedings' in s 6 of the Arbitration Act 1952 ('the Act').

Held, allowing the appeal:

(1) The entry of appearance was the mandatory procedural step to be taken by an applicant in a proceedings in the High Court. It was a step in the proceedings as required by the RHC. However, it was a permitted, excluded or an exempted step in the proceedings that did not amount to a step in the proceedings within the meaning of s 6 of the Act, which would prejudice the applicant's right to apply for a stay of the proceedings (see p 638B).

(2) If the applicant had served any pleadings, then he had clearly taken a step in the proceedings within the meaning of s 6 of the Act. He had thereby elected to proceed with the proceedings in the High Court and would be barred from applying for a stay of proceedings to refer the dispute to arbitration (see p 638C).

(3) If he has taken any other action in the proceedings other than steps of entering appearance or serving pleadings, the court would then have to consider whether such action amounted to a step in the proceedings by determining the nature of the action and whether or not it indicated an unequivocal intention to proceed with the suit and to abandon the right to have the dispute disposed off by arbitration (see p 638D–E).

[**Bahasa Malaysia summary**

Pertikaian di antara perayu dan responden pertama adalah mengenai suatu perjanjian kerja tanah yang mengandungi klausa timbangtara. Di dalam rayuan ini, soalan di hadapan mahkamah adalah sama ada

fungsi kemasukan kehadiran dalam satu statut, iaitu Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') adalah sama dengan fungsi yang dimainkan oleh perkataan-perkataan 'steps in the proceedings' dalam s 6 Akta Timbangtara 1952 ('Akta tersebut').

Diputuskan, membenarkan rayuan tersebut:

(1) Kemasukan kehadiran merupakan langkah prosedur mandatori yang diambil oleh seorang pemohon dalam prosiding di Mahkamah Tinggi. Ia merupakan satu langkah dalam prosiding seperti yang diperuntukkan dalam KMT. Walau bagaimanapun, ia merupakan suatu langkah yang dibenarkan, dikecualikan atau dimasukkan dalam prosiding yang tidak merupakan langkah dalam prosiding seperti yang diperuntukkan dalam s 6 Akta tersebut, yang akan memprejudiskan hak pemohon untuk memohon penggantungan prosiding (lihat ms 638B).

(2) Jikalau pemohon telah menyampaikan sebarang pliding, ini bermakna bahawa beliau telah jelas mengambil satu langkah dalam prosiding seperti dalam s 6 Akta tersebut. Beliau telah memilih untuk meneruskan prosiding di dalam Mahkamah Tinggi dan akan dihalang daripada memohon untuk penggantungan prosiding bagi tujuan merujuk pertikaian tersebut kepada timbangtara (lihat ms 638C).

(3) Jikalau beliau telah mengambil sebarang langkah lain dalam prosiding tersebut selain daripada langkah memasukkan kehadiran atau menyampaikan pliding, mahkamah perlu membuat pertimbangan sama ada langkah tersebut merupakan suatu langkah dalam prosiding dengan menentukan sifat tindakan tersebut dan sama ada ia menunjukkan niat jelas untuk meneruskan guaman dan meninggalkan hak beliau untuk menyelesaikan pertikaian tersebut melalui timbangtara (lihat ms 638D–E).]

Notes

For cases on stay of proceedings, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1014–1052.

Cases referred to

Cheah Wai Poh v Chin Bros & Co Ltd [1958] MLJ 215 (refd)

Ford's Hotel Co v Barlett [1896] AC 1 (refd)

Interscope Versicherung Sdn Bhd v Sime Axa Assurance Bhd and another appeal [1999] 2 MLJ 529 (refd)

Malayan Banking Bhd v Swasta Jaya Sdn Bhd [1990] 2 MLJ 12 (refd)

Nuruddin Abdulhussein v Abu Ahmed Abdul Jalli AIR 1950 Bom 127 (refd)

Sim Hiang Kiaw & Ors v Lee Hoi Kim Construction Co [1986] 1 MLJ 347 (refd)
Trans Resources Corp Sdn Bhd v Sanwell Corp & Anor [1999] 2 MLJ 609 (refd)
Trans Resources Corp Sdn Bhd v Sanwell Corp & Anor [2001] 1 MLJ 380 (refd)
Usahabina v Anuar b Yahya [1998] 7 MLJ 691 (refd)

Legislation referred to

Arbitration Act 1952 s 6
Arbitration Act 1996 [Eng] s 9(3)
Arbitration Act 1950 [Eng] s 4(1)
Arbitration Act 1940 [India] s 34
Arbitration Ordinance (Extension) Order 1972
Arbitration Ordinance 1950 of the Federation of Malaya
Arbitration Ordinance of Sabah
Modification of Laws (Declaration of Federal Present Laws) (Sarawak) Order 1969
Rules of the High Court 1980 O 5 rr 1, 2, 3, 4, O 8, O 9, O 10, O 11, O 12 r 7
Rules of the Supreme Court 1965 [Eng] O 72
Sarawak Arbitration Ordinance

Appeal from: Civil Appeal No W–02–489 of 1999 (Court of Appeal, Kuala Lumpur) and Civil Suit No S2–22–42 of 1998 (High Court, Kuala Lumpur)

Loh Siew Cheang (*Rajashree Suppiah* and *Cindy Goh Joo Seong* with him) (*Cheang & Ariff*) for the appellant.

Wong Chong Wah (*Choo Chee Choy* and *Mohd Arief Emran Arifin* with him) (*CC Choo & Co*) for the first respondent.

Logan Sabapathy (*Philip Phua* with him) (*Logan Sabapathy & Co*) for the first respondent.

Mohtar Abdullah FCJ (delivering judgment of the court): In the present appeal, the question posed to this court is 'whether the function to be served by an entry of appearance in one statute, ie the Rules of the High Court 1980 ('the RHC') is the same as the function to be served by the words 'steps in the proceedings' in s 6 of the Arbitration Act 1952' ('the Act').

In *Sime Axa Assurance Bhd v Interscope Versicherung Sdn Bhd* Federal Court Civil Appeal No 02–08–2000(W) ('*Sime Axa Assurance*'), a similar question was posed before a different panel of this court, viz, 'whether an entry of an unconditional appearance constitutes a step in the proceeding within the meaning of s 6 of the Act'. That question was answered in the negative. Unfortunately, there was no written judgment delivered.

The factual background of the present appeal can be briefly narrated. The dispute between the appellant and the first respondent centred upon

an earthworks contract dated 30 October 1996 which contained an arbitration clause as follows:

> Arbitration
>
> (a) If any dispute or differences shall arise between the client and the earthworks contractor, either during the progress or after completion of the works, or after the termination of the earthworks contractor's employment, or breach of this contract, as to:
>
> (i) the construction of this contract, or
> (ii) any matter or thing of whatsoever nature arising under this contract …
>
> then such dispute or difference shall be referred to the Regional Centre for arbitration at Kuala Lumpur ('the arbitrator') for a decision …

The terms 'client' and 'earthworks contractor' abovementioned refer to the appellant and the first respondent respectively. The first respondent sued the appellant for a sum of RM17,459,445.69 allegedly owed by the appellant for earthworks performed under the earthworks contract. The appellant disputed the claim. The appellant entered an unconditional appearance in the action on 22 May 1998. Thereafter, on 22 July 1998, the appellant filed an application for stay of proceedings in the High Court pursuant to s 6 of the Act. The Act, modelled on the English Arbitration Act 1950, was enacted in 1952 as the Sarawak Arbitration Ordinance ('the Ordinance'). In 1965, by the Modification of Laws (Declaration of Federal Present Laws) (Sarawak) Order 1969, which was deemed to have come into force on Malaysia Day, the Ordinance was declared to be federal law. Subsequently, it was modified and extended to apply throughout Malaysia by the Arbitration Ordinance (Extension) Order 1972 which came into force on 1 November 1972. The Arbitration Ordinance 1950 of the Federation of Malaya and the Arbitration Ordinance of Sabah were thereby repealed.

Section 6 of the Act provides:

> If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration or any person claiming through or under him in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

In the High Court (see *Trans Resources Corp Sdn Bhd v Sanwell Corp & Anor* [1999] 2 MLJ 609), Kamalanathan Ratnam J ('the learned judge') allowed the appellant's (ie the first defendant's) application for a stay of the court proceedings. In coming to his conclusion, the learned judge correctly analyzed the four requirements to be satisfied under s 6 of the Act before a stay could be granted, ie:

(a) that the legal proceedings must have been commenced against the applicant in respect of a matter which has been agreed should be referred to arbitration;

(b) that no other steps in the proceedings be taken before the making of the application for stay;

(c) that there is no sufficient reason why the matter ought not to be referred to arbitration as agreed between the parties; and

(d) that the applicant was at the time when the proceedings were commenced ready and willing, and still remains ready and willing, to do all things necessary to the proper conduct of the arbitration.

In opposing the application for a stay, the first respondent (ie the plaintiff) raised four issues, viz:

(a) that there was no dispute as the appellant had acknowledged that there was a debt due and owing by the appellant to the first respondent;

(b) that the disputed relief sought was not within the terms and scope of the arbitration clause;

(c) that there would be multiplicity of proceedings; and

(d) that the appellant had taken a step in the proceedings by filing an unconditional appearance.

The second respondent (the second defendant in the High Court) raised issues quite similar to those raised by the plaintiff.

Requirement (b) and issue (d) above are relevant for the purpose of the question posed to this court. The first respondent argued that the appellant had taken a step in the proceedings by filing an unconditional appearance. The issue in the High Court was whether the entry of an unconditional appearance was a step in the proceedings. If so, then stay should not be allowed. The learned judge, however, allowed the stay. In his judgment, he examined the decision of Augustine Paul JC ('the learned JC') in *Usahabina v Anuar bin Yahya* [1998] 7 MLJ 691 ('*Usahabina*'), relied upon heavily by the first respondent. The learned JC had held that the entry of an unconditional appearance did amount to a step in the proceedings, thus barring an application for stay. The learned judge respectfully declined to follow the learned JC's decision in *Usahabina*. He ruled:

> To my mind, the entering of an unconditional appearance cannot amount to a waiver of the defendant's right to proceed to arbitration on the basis that the plaintiff's filing of the civil suit herein does not amount to either an irregularity or a defect in the writ or service thereof and in opposing the action, it has not been the first defendant's contention that the court has no jurisdiction to deal with the dispute.

In arriving at his decision, it must be noted that the learned judge did not have the benefit of the subsequent judgment of the Court of Appeal in *Interscope Versicherung Sdn Bhd v Sime Axa Assurance Bhd and another appeal* [1999] 2 MLJ 529 ('*Interscope*') which affirmed *Usahabina*.

In *Interscope*, Gopal Sri Ram JCA, in delivering the judgment of the Court of Appeal states at p 534:

> After a careful consideration of the cases upon the subject, I have reached the conclusion that *Usahabina* was rightly decided and that the entry of an unconditional appearance does indeed constitute the taking of a step in the proceedings within s 6 of the Act. I find it unnecessary to formulate my own reasons for arriving at my conclusion. Instead, I gratefully adopt all that was said by Augustine Paul JC upon the point in *Usahabina*. It follows that the line of cases that take the contrary view were wrongly decided and ought no longer to be followed. In my judgment, if a defendant intends to apply to stay an action in reliance of s 6 of the Act, he must enter a conditional appearance before moving the court.
>
> Since the respondent in the present instance had taken a step in the proceedings, it lost the right to invoke s 6 of the Act …

The first respondent, in due course, appealed to the Court of Appeal against the decision of the learned judge. When this case came up before the Court of Appeal (see *Trans Resources Corp Sdn Bhd v Sanwell Corp & Anor* [2001] 1 MLJ 380 ('*Trans Resources*')), Shaik Daud JCA referred to the abovementioned judgment of Gopal Sri Ram JCA in *Interscope* and held as follows at p 383:

> The High Court in the present case did not have the benefit of the subsequent judgment of the Court of Appeal in *Interscope* when it decided on the same issue. Until overruled by the Federal Court, this court is bound by its own decision in *Interscope* …

On that score, the first respondent's appeal was allowed and the order of the learned judge in the High Court was set aside. Hence, the appellant's appeal before us now is by virtue of the leave granted by this court based on the question of law posed as abovestated. The Court of Appeal's decision in *Interscope* has been overruled by the Federal Court on 18 September 1999, in *Sime Axa Assurance*. The Federal Court ruled that the entry of an unconditional appearance did not constitute a step in the proceedings by answering the relevant question in the negative. No reference to the decision of the Federal Court in *Sime Axa Assurance* was made by Shaik Daud JCA who delivered the Court of Appeal's judgment in *Trans Resources* on 13 November 2000, slightly over a year after *Sime Axa Assurance* was decided.

So the latest decision on this point in the Federal Court is *Sime Axa Assurance*. As mentioned earlier, no written judgment was delivered. Thus, we do not have the benefit of knowing the reasons for rejecting the decision of the Court of Appeal which adopted and affirmed the reasonings of the learned JC in *Usahabina*.

Before us, Mr Wong Chong Wah, counsel for the first respondent, principally relied on *Interscope* and *Usahabina* in his submission that the appellant, by filing an unconditional appearance, has taken 'a step in the proceedings' within the meaning of s 6 of the Act, thus forfeiting its right of invoking the arbitration clause under the earthworks contract.

At this juncture, we note the existence of one salient fact in *Usahabina* which was mentioned in passing by the learned JC, but unfortunately not properly appreciated by him. It is this fact. In that case, the defendant who had entered an unconditional appearance failed to file his defence within the time limited for doing so. He had requested for, and the plaintiff had agreed to, an extension of one week to file the defence. Pausing here for a moment, what the defendant did was clearly a step in the proceedings within the meaning of s 6 of the Act by requesting an extension of time to file the defence, clearly indicating an intention to deliver a statement of defence, thus abandoning the right to arbitration (see *Ford's Hotel Co v Bartlett* [1896] AC 1). As the defendant failed to file the defence within the extended period, the plaintiff entered judgment in default. It was only after judgment in default was entered that the solicitors for the defendant drew the attention of the solicitors for the plaintiff to the arbitration clause in their contract document, and consequently, gave notice that the defendant wished for the dispute to be referred to the arbitrator. After the defendant had received a copy of the judgment in default, he filed a summons in chambers praying for an order, inter alia, that:

(a) the judgment in default be set aside;

(b) the matter be stayed and/or referred to an arbitrator;

(c) alternatively, he be allowed to bring in a third party to the proceedings;

(d) alternatively, he be allowed to file his defence and counterclaim.

While the learned JC correctly noted that in substance, the application of the defendant was primarily to have the judgment set aside and consequently for the case to be stayed pending reference to arbitration or, alternatively, for leave to be allowed to file his defence and other relevant documents, the learned JC erred in failing to take into account that the defendant had gone a step further than the entry of an unconditional appearance in that, as hereinbefore mentioned, he had requested an extension of time to file his statement of defence. The defendant's belated attempt to resort to arbitration was an afterthought after judgment in default had been entered against him. It must be noted in passing that the alternative prayers (c) and (d), ie that he be allowed to bring in a third party to the proceedings and that he be allowed to file his defence and counterclaim, would also indicate his intention to continue with the proceedings in the High Court. These actions, as prayed, could arguably constitute additional steps in the proceedings taken by the defendant which would negate his belated wish to return to arbitration. Having indicated his election to allow the proceedings to go on in the High Court by applying for the extension of time to file his defence, and after having failed to do so within the extended time, it was too late in the day for the defendant to revert to arbitration after abandoning his right to do so.

In this context, *Usahabina* was a case of the defendant taking more than one step in the proceedings, ie one step in filing the unconditional appearance and another step by applying for the extension of time, clearly indicating an intention to go on with the proceedings instead of asserting his

right to arbitration. Even if the first step was not a step in the proceedings as envisaged by s 6 of the Act, the second step certainly was. The situation is worse if one takes into account the two alternative prayers in his summon in chambers. On this fact, the learned JC could have properly concluded that the defendant had taken a step in the proceedings not because of the entry of unconditional appearance but because of his application for the extension of time. The conclusion reached by the learned JC that the entry of an unconditional appearance was a step in the proceedings cannot be the basis for a similar finding in our present case. The facts are clearly distinguishable. On the facts of our present case, the appellant has not abandoned his right to resort to arbitration.

Before us, Mr Loh Siew Cheang, counsel for the appellant, complains that his client is being punished for putting in an unconditional appearance. The appellant is not applying to set aside the writ. It is not disputing the jurisdiction of the High Court, either because of irregularity in the writ or because of the service of process or on any other ground. It is not contending that the court has no jurisdiction to deal with the dispute. It submits to and invokes the jurisdiction of the High Court to uphold the agreement between the parties to resolve their dispute by arbitration. All that the appellant wants to do is to apply for a stay of the proceedings to pursue the agreed recourse to arbitration. Mr Loh argues that where a plaintiff sues a defendant upon a contract containing an arbitration clause, the defendant does not make an application to set aside a writ or a service of the writ within the meaning of O 12 r 7 of the Rules of the High Court 1980 ('the RHC'). This is because the court always has jurisdiction in respect of a contract containing an arbitration clause and, subject to the jurisdiction of the court under the Act to send the matter for arbitration, there is nothing irregular on the part of the plaintiff to file a writ in court notwithstanding the existence of the arbitration clause. The proper course of action is to file an unconditional appearance to invoke the court's jurisdiction to stay proceedings under s 6 of the Act. That is why a conditional appearance is not filed by the appellant. A conditional appearance is an appearance in qualified terms, reserving to a defendant the right to apply to the High Court to set aside the writ or the service of the writ. The purpose of a conditional appearance is to prevent a judgment in default of appearance being entered against a defendant. The appellant is merely protecting its position in the High Court proceedings while seeking recourse to arbitration by applying for a stay of the said proceedings.

Mr Logan Sabapathy, counsel for the second respondent, supports the legal position of the appellant though the second respondent has no part to play in the present appeal.

We agree with Mr Loh's submission. In *Cheah Wai Poh v Chin Bros & Co Ltd* [1958] MLJ 215, Syed Sheh Barakbah J (as he then was), in agreeing with the submission of Mr SK Das, counsel for the defendant, succinctly said at p 217:

> According to the learned counsel for the defendant, the entry of appearance was merely to prevent judgment being obtained by default. I agree with this

A submission. In my opinion, that is all that the defendant desired to do when he entered an unconditional appearance. I am therefore of the opinion that this is a proper case for granting stay of further proceedings, and I accordingly make an order in terms of the application with costs.

In the courts below, much in-depth discussion was centred on the meaning and effect of specifically entering an unconditional or a conditional appearance rather than a discussion of whether entering appearance per se would constitute 'any other step' in the proceedings in the context of s 6 of the Act. The real issue is not whether an appearance (unconditional or otherwise) is a step in the proceedings, but whether it is 'any other step' in the proceedings within the meaning of s 6 of the Act. If it is, then the defendant is precluded from applying for a stay of the proceedings to refer the dispute for arbitration. If not, then subject to fulfilling the other requirements spelt out by the learned judge as aforesaid, the court may order a stay of the said proceedings. To my mind, the word 'other' in the phrase 'any other steps in the proceedings' is crucial to the interpretation of that phrase. The obvious and most logical interpretation of that phrase is that it refers to any other step(s) — other than the initial, the first, the primary or the main step in a sequence or series of steps in any proceedings in the High Court.

Under the RHC, the first step taken by a plaintiff or a party initiating an action is to begin the proceedings in the High Court by writ, originating summons, originating motion or petition (O 5 r 1 of the RHC). The RHC then provides for the conditions under which proceedings must be begun by writ (O 5 r 2 of the RHC), or by originating summons (O 5 r 3 of the RHC), or may be begun by either writ or originating summons (O 5 r 4 of the RHC). Similarly, O 8 and O 9 of the RHC concern the beginning of proceedings by originating motions and petitions respectively. In the context of our present case, the first step in the proceedings by the first respondent (as plaintiff) is the issuance of a writ to begin the action in the High Court against the appellant (as defendant) for the stated sum allegedly owed by the appellant for earthworks performed under the earthworks contract.

After service has been effected on a defendant in accordance with the provisions of O 10 and O 11 of the RHC, what must a defendant do, or what steps must he first take if he wishes to defend the action? Order 12 requires the defendant to first enter an appearance. Until an appearance has first been entered, ie until this first procedural step of entering appearance has been taken, the defendant is not entitled to take any other step to defend the action. As correctly stated by Lee Hun Hoe CJ (Borneo) in *Malayan Banking Bhd v Swasta Jaya Sdn Bhd* [1990] 2 MLJ 12:

> Appearance is a very important process by which a defendant shows his intention to defend and submits himself to the jurisdiction of the court.

In the context of our present case, the appellant disputed the claim and took its first step in the proceedings by entering an appearance. More specifically, it entered an unconditional appearance in the action on 22 May 1998. Thus, it has taken its first step in the proceedings. Is the appellant therefore

precluded from applying for a stay of the said proceedings in the High Court for taking a step in the proceedings, albeit a mandatory first step as required under the RHC? By its action, the appellant has shown that it is interested in defending the action, but because of the arbitration clause in the earthworks contract, it is interested in having the dispute resolved by arbitration. When the writ is served on the appellant, it is put in a dilemma. If the appellant does not take any step to defend itself by entering an appearance, judgment in default of appearance may be entered against it. If the appellant enters an unconditional appearance, the opposing party will claim that it has taken a step in the proceedings, as alleged in this case, thus jeopardizing its application for stay of the proceedings, and the appellant cannot file a conditional appearance because it is not challenging the jurisdiction of the court or applying to set aside the writ or service of the writ. Under s 6 of the Act, 'if the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration', ie if he has not abandoned his right to seek recourse through arbitration, such applicant may, 'before taking any other steps in the proceedings' apply to the court to stay the proceedings. This the appellant had done when it filed an application for stay of proceedings in the High Court on 22 July 1998 after entering unconditional appearance on 22 May 1998.

The learned JC in *Usahabina* pointed out the difference in the wordings of the English provision compared to s 6 of the Act. Section 4(1) of the English Arbitration Act 1950 ('the English Act') reads:

> Staying court proceedings where there is submission to arbitration — (1) If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to those legal proceedings may *at any time after appearance, and* before *delivering any pleadings* or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement, and that the applicant was, at the time when the proceedings were commenced and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings. (Emphasis added.)

The words underlined do not appear in the Malaysian Act. Under the English Act, it is very clear that the first step of entering an appearance is not included in the phrase 'other steps in the proceedings'. The time frame prescribed for applying to the court for a stay of the proceedings is 'at any time after appearance' but before 'delivering any pleadings' or 'before taking any other steps in the proceedings'. If the applicant has taken his first step in the proceedings by entering an appearance, that step is a permissible step that is not considered to be a step in the proceedings that would bar an application for stay. However, if the applicant has subsequently delivered any pleadings, or taken any other step in the proceedings which indicates his election to allow the action to proceed in the court, the applicant will be

considered to have abandoned his right to seek recourse to arbitration and would be barred from applying for a stay of the proceedings. *Halsbury's Laws of England* (4th Ed, Reissue) para 627, at pp 347–348, explains the situation:

> The applicant must have taken no step in the proceedings after acknowledgment of service. A step in the proceedings is an act which both invokes the jurisdiction of the court and which demonstrates the applicant's election to allow the action to proceed. An applicant may take what would otherwise be a step if he makes it clear that the act is done without prejudice to his right to apply for a stay. Steps in the proceedings have been held to include: the filing of an affidavit in opposition to a summons for summary judgment, service of defence, and an application to the courts for leave to serve interrogatories, or for a stay pending the giving of security for costs or for an extension of time for serving a defence, or for an order for discovery, or for an order for further and better particulars.

Under the present English rules (Rules of the Supreme Court 1965 O 72), the term 'acknowledgment of service' is now used instead of 'appearance'. Order 12 r 10 of the RHC further provides:

> Acknowledgment of service to be treated as entry of appearance. For the purpose of any enactment referring expressly or impliedly to the entry of appearance as a procedure provided by rules of court for responding to a writ or other process issuing out of the High Court, or of any rule of law, the acknowledgment of service of the writ or other process in accordance with these rules shall be treated as the entry of an appearance to it, and related expressions shall be construed accordingly.

In England, therefore, the question whether the entry of an appearance or acknowledgment of service is a step in the proceedings does not arise. It has been specifically excluded or exempted. Also, there is no ambiguity regarding the delivery of pleadings as a step in the proceedings. Therefore, English courts are only concerned with whether some other acts would constitute a step in the proceedings by examining the nature of the acts concerned, whether such acts demonstrate an election to continue with the proceedings in the court, as illustrated in the passage abovequoted. The position is similar in Singapore, Australia and Canada where the relevant provisions are similarly crafted as the English Act. However, the position in England today is now governed by the Arbitration Act 1996 ('the AA').

Section 9 of this AA provides:

> Stay of legal proceedings
>
> (1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings, so far as they concern that matter.
>
> (2) An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.

(3) An application may not be made by a person before taking the appropriate procedural steps (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.

(4) On an application under this section, the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.

(5) …

Though differently worded, the time frame prescribed under s 9(3) of the AA remains basically the same as in s 4(1) of the English Act.

The Malaysian provision, as couched in s 6 of the Act, omits the references to 'after appearance' and 'before delivering any pleading'. This provision is identical to s 5 of the repealed Arbitration Ordinance 1950 of the Federation of Malaya. Gopal Sri Ram JCA, in *Interscope*, in referring to these differences, said that s 6 of the Act and 'the equipollent United Kingdom statutory provision' are 'differently constructed'. With respect, we beg to disagree. The basic structure and framework of the two provisions are the same, save for the two phrases which are omitted in the Malaysian text. The difference is in the drafting style, in describing the time frame to apply for a stay of the proceedings. The fact remains that the two provisions, though not in identical terms, are *in pari materia* as regards the fact that the entry of appearance is an excluded step, and that any other step taken after it would be a step in the proceedings.

Tan Chiaw Thong J had made the astute observation in *Sim Hiang Kiaw & Ors v Lee Hoi Kim Construction Co* [1986] 1 MLJ 347 at p 347:

> In my view, the matters at issue in this action would appear to be matters in respect of which, by virtue of the agreement mentioned earlier, the parties have agreed to refer to arbitration. The sole point to consider here, in my view, is whether in terms of s 6 of the Arbitration Act 1952, the defendants before applying to this court to stay the proceedings and have the matters referred to arbitration, had taken 'any other steps in the proceedings'. The wording of this section is *in pari materia* with the corresponding English legislation, except for words 'before a party has delivered any pleadings' which appear in the English legislation but not in ours. Be that as it may, as mentioned, the point to consider is whether the defendants, before making their application for stay, had taken any other steps in the proceedings.

In India, the words 'at any time after appearance' were omitted when s 19 of the Indian Arbitration Act 1899 was replaced by s 34 of the Indian Arbitration Act 1940. Section 34 reads:

> Power to stay legal proceedings where there is an arbitration agreement — Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, *at any time before filing a written statement or taking any other steps in the proceedings*, apply to the judicial authority before which the proceedings are pending to stay the proceedings; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant

A was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings. (Emphasis added.)

In *Nuruddin Abdulhussein v Abu Ahmed Abdul Jalli* AIR 1950 Bom 127, the B judgment of Tendolkar J is very illuminating:

> This is a notice of motion for stay of the suit on the ground that there is a valid agreement for reference to arbitration. It is resisted on the plea that the defendant has taken a step in the proceedings in that he has filed an unconditional appearance in court. The question for decision therefore is whether filing of an unconditional appearance is a step in the proceedings.
>
> C Such a question has not arisen for determination either in England or in India for the simple reason that both under s 4 of the English Arbitration Act and under s 19 of the Arbitration Act 1899, a step in the proceedings taken 'at any time after appearance' disqualifies the defendant from applying for stay, with the result that, whether or not filing of an appearance was a step in the proceedings, it was manifestly inarguable that it prevented the defendant from D applying for a stay of the suit. Section 34 of the Arbitration Act 1940, which takes the place of s 19 of the Act of 1899, omits the words 'at any time after appearance' and the relevant words of the section now are:
>
> > 'Any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay E the proceedings'.
>
> It is argued, in the first instance, that as the words 'at any time after appearance' which still appear in the English Act, and which appeared in the Indian Act of 1899, have deliberately been deleted, it must have been the intention of the legislature that filing of an appearance, which, before the amendment, was not a step in the proceedings for the purposes of the section, F should, after the amendment, be considered to be one. This argument to my mind is wholly untenable. The old Act in effect provided that nothing done prior to and inclusive of the filing of an appearance should debar a defendant from applying for a stay irrespective of whether such act or acts were steps in the proceedings or not. In my opinion, it does not help us to determine whether or not any of such acts was a step in the proceedings. The amendment changes the law by providing that the step in the proceedings may be taken at G any stage, but it cannot possibly bring about the result that every act done prior to and inclusive of the filing of an appearance, which up to the date of the amendment did not constitute a bar to an application for stay, becomes ipso facto a step in the proceedings after the amendment. In the case of every such act, as in the case of acts subsequent to appearance, one has to consider in each case the nature of the act, and to determine whether it is or is not a H step in the proceedings.

It is common knowledge that our legal draftsmen have a long established tradition and practice since pre-independence days of referring to English and Indian legislation in the drafting of similar local laws. The Indian amendments to their arbitration laws in 1940 would not have gone I unnoticed by our lawmakers in 1950 and 1952. In fact, our lawmakers improved on the Indian draft by also omitting the words 'before delivering any pleadings' without affecting the scope and intent of that provision.

Mr Wong Chong Wah submits that there must be a reason why the words 'after appearance' are left out. Perhaps this is the answer. Be that as it may, the provisions in the original version in the English Act and the abridged version in the Malaysian Act are *in pari materia*. Therefore, the legal position in Malaysia may be neatly summarized as follows:

(a) the entry of appearance is the mandatory procedural step to be taken by an applicant in proceedings in the High Court. It is a step in the proceedings as required by the RHC. However, it is a permitted, excluded or an exempted step in the proceedings that does not amount to a step in the proceedings within the meaning of the s 6 of the Act which would prejudice the applicant's right to apply for a stay of the proceedings;

(b) if the applicant has served any pleadings, then he has clearly taken a step in the proceedings within the meaning of s 6 of the Act. He has thereby elected to proceed with the proceedings in the High Court and would be barred from applying for a stay of proceedings to refer the dispute to arbitration;

(c) if he has taken any other action in the proceedings (other than steps (a) or (b) abovementioned), the court will then have to consider whether such action amounts to a step in the proceedings by determining the nature of the action and whether or not it indicates an unequivocal intention to proceed with the suit and to abandon the right to have the dispute disposed off by arbitration.

We reaffirm that *Sime Axa Assurance* correctly decided that an entry of an unconditional appearance does not constitute a step in the proceedings within the meaning of s 6 of the Act. It is obvious that a conditional appearance entered with a view of making an application to set aside the writ or service of the writ under O 12 r 7 of the RHC would not amount to a step in the proceedings either. In short, an entry of appearance under O 12 of the RHC would not amount to a step in the proceedings within the meaning of s 6 of the Act.

We would therefore answer the question in the negative in that the function to be served by the entry of appearance in the RHC is not the same as the function to be served by the words 'steps in the proceedings' in s 6 of the Act. Since this appeal before us concerns only the question posed, we did not hear any submission on the other issues decided by the learned judge in the High Court in exercising his discretion to stay the proceedings, especially so when the Court of Appeal's judgment in *Trans Resources* has not discussed those issues at all. Shaik Daud JCA dealt solely with issue (d), ie that the appellant had taken a step in the proceedings by filing an unconditional appearance, and did not make any separate findings on the other issues. We see no reason to disturb the learned judge's reasoned findings on those issues. In the circumstances, we would allow the appeal with costs here and below.

We set aside the order of the Court of Appeal and reinstate the order of the learned judge. We order that the proceedings in the High Court be

stayed to allow the dispute to be resolved by arbitration by virtue of the arbitration clause in the earthworks contract between the parties. The deposit is to be refunded to the appellant to the account of taxed costs.

Appeal allowed.

Reported by Peter Ling